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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

WILLIAM P. TAVOULAREAS,
Petitioner,
v.
THE WASHINGTON POST COMPANY,
and
PATRICK TYLER,
Respondents.

WILLIAM P. TAVOULAREAS,
Petitioner,
v.
PHILIP PIRO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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June 11, 1987

Questions Presented

1. Whether, in rejecting a jury finding and that of a panel of its own court that a newspaper article was false, the *en banc* court of appeals:

a) improperly extended the requirement of independent appellate review set out in *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), to the issues of defamatory meaning and falsity, thereby violating petitioner's seventh amendment rights; and

b) violated petitioner's constitutional and common law rights by applying a novel, unprecedented, and unarticulated principle of "most restrictive meaning" of the article?

2. Whether, in rejecting a jury finding and that of a panel of its own court that a false newspaper article was published with actual malice, the *en banc* court of appeals violated petitioner's seventh amendment rights by refusing to consider the evidence and the inferences therefrom in the light most favorable to petitioner, contrary to the teachings of this Court in *Bose Corp., supra,* and *Anderson* v. *Liberty Lobby, Inc.,* 106 S. Ct. 2505 (1986)?

3. Whether the court of appeals correctly held that petitioner was a public figure for purposes of this case and, if so, whether the public figure doctrine should be overruled?

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IN THE

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October Term, 1986

Nos. 86-

WILLIAM P. TAVOULAREAS,

Petitioner,

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THE WASHINGTON POST COMPANY

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PATRICK TYLER,

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WILLIAM P. TAVOULAREAS,

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PHILIP PIRO,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner William P. Tavoulareas respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 13, 1987.

Opinions Below

The order and opinion of the district court finding petitioner to be a public figure are unreported. They appear in the appendix at A369-A390. The district court's opinion awarding judgment notwithstanding the verdict ("j.n.o.v.") to respondents The Washington Post Company and Patrick Tyler (A1-A22) is reported at 567 F. Supp. 651 (D.D.C. 1983). The district court's opinion awarding j.n.o.v. to respondent Philip Piro (A23-A26) is unreported. The opinion of the panel of the court of appeals reinstating the jury verdicts (A27-A176) is reported at 759 F.2d 90 (D.C. Cir. 1985). The panel's opinion denying respondents' petitions for rehearing, and the orders of the full court vacating the panel's judgment and opinions, and ordering rehearing *en banc* (A177-A195; A391-A392) are reported at 763 F.2d 1472, 1481 (D.C. Cir. 1985). The opinions of the *en banc* court of appeals affirming the judgments n.o.v. of the district court (A198-A361) are not yet officially reported.

Jurisdiction

The judgment of the court of appeals was entered on March 13, 1987. This petition for certiorari was filed within 90 days of that date. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

The first amendment provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

The seventh amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial

by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States than, according to the rules of the common law.

Statement of the Case

This petition arises out of the widely publicized consolidated libel actions by petitioner William Tavoulareas ("Tavoulareas") against respondent The Washington Post Company, several of its employees, including its reporter, respondent Patrick Tyler, and one of Tyler's "sources", respondent Philip Piro.[1] Following a three-week trial, the jury returned verdicts for petitioner that subsequently were set aside by the district court because of insufficient proof of actual malice. On appeal, a panel of the court of appeals reinstated the jury's verdicts, but its judgment was in turn overturned by an *en banc* court, principally on the ground that, as a matter of law, the article was substantially true.

A. The November 30th Article

On November 30, 1979 *The Washington Post* (the "*Post*") published a front-page article about petitioner. A115-A127. The article began as follows:

---

[1] Jurisdiction in the district court was predicated on 28 U.S.C. § 1332. The actions were based upon two front-page articles, a November 30, 1979 article, and a December 1, 1979 follow-up article. The jury found no liability with respect to the latter article, and it is not at issue here. The action against Piro, a respondent in the court below and here, is not given separate treatment herein because the litigation of his case has followed the same pattern as that of the *Post* action. Many of the central issues raised by this petition are applicable to his case, and space limitations preclude separate treatment thereof.

MOBIL CHIEF SETS UP SON IN VENTURE

Management Firm Is Used to Operate Oil Company Ships

by Patrick Tyler
Washington Post Staff Writer

Mobil Oil Corp. president William P. Tavoulareas set up his son five years ago as a partner in a London-based shipping management firm that has since done millions of dollars in business operating Mobil-owned ships under exclusive, no-bid contracts.

Tavoulareas' son, Peter, was a 24-year-old shipping clerk in 1974, making $14,000 a year. Today, with the help of Mobil, he owns 45 percent of Atlas Maritime Co., which operates 17 ships worldwide.

Mobil, the second largest oil company, provided Atlas with some of these ships—among them Mobil-owned supertankers—under management agreements that allowed Atlas to go into business with a minimal amount of capital.

Mobil also initially provided Atlas with office space in Mobil's corporate offices in London and loaned Atlas a Mobil shipping vice president when Atlas' own top shipping executive resigned in 1975.

The theme that Tavoulareas misused his position as Mobil's president to make Mobil assets available to his son's enterprise, so clearly communicated by the headline and opening paragraphs, was elaborated extensively in the remainder of the lengthy article. The article claimed that those transactions were "a marked departure from Mobil's historical practice", that they "creat[ed] work for Atlas at a time when the shipping industry was severely depressed",

and that they made petitioner's son "an overnight success." *Id.*, at ¶¶ 5-8. Petitioner's manipulative transactions were said to have taken place through an intermediary company, Saudi Maritime Company, "Samarco" (¶ 6), asserted to exist "largely on paper" (¶ 44), with " 'no staff or offices' " (¶ 45), whose purpose was "to . . . acquir[e] ships for Atlas to manage" (¶ 55). As if its words were not clear enough, the article contained a chart prepared by a *Post* graphic artist showing oil tankers bypassing Samarco and moving directly from Mobil to Atlas. RE 2335.

The *Post* clearly recognized that the article charged petitioner with misuse of his corporate position. Shortly before publication of the article, the *Post* copy editor responsible for its final edit, Christine Peterson, sent a memorandum to her assignment editor. She described as "impossible to believe" the article's main implication that Tavoulareas would so misuse Mobil assets:

> I've read the Mobil story several times, . . .
>
> Parts of Tyler's case against Tavoulareas seem tenuous, and *the whole—a $680,00* [*sic*]*-a-year plaything for an indulged son*, at worst—just seems like a withered peanut in an 84" gilded shell.
>
> A far more interesting angle, it seems to me, is Mobil's concern about Saudi preference shipping—a concern so profound that *it led to the formation of an entire dummy corporation. It's impossible to believe that Tavoulareas alone could put together such a scheme for the sake of his son's business career, or that he would want to.*

A362 (emphasis added).

Stung by Editor Peterson's expressions of doubt to her superior, *Post* reporter Tyler wrote a responsive memorandum in which he insisted that:

> Mobil undertook some incredibly fancy corporate footwork in the wake of the embargo to apparently accomplish two things: ingratiate itself with the Saudis . . . and set up the son of Mobil's president in a shipping business when business was bad and the business, therefore, stood little chance of prospering without Mobil's help. . . .
>
> Our story does show that Mobil's decisions in this case were *not* made for the traditional business reasons, or for the reasons stated by Mobil. . . .
>
> It should not seem impossible that Mobil—which originally turned down a chance *to join Samarco—changed its mind after it dawned on Mobil's president that such a partnership would justify the creation of a small management firm at a time when Tavoulareas' son was aspiring to such a career and was already at work with one of the Greek shippers.* Samarco can be seen as nothing more complicated than a slight diversion from Mobil in the way it moved its crude oil from point A to point B.
>
> The question of "why" Mobil's president would want to *orchestrate* such a diversion when it would benefit his son's business career is begging things a little.

A364-A367 (emphasis added).

After unsuccessfully seeking retraction of the libel, petitioner brought suit alleging that the article had defamed him by falsely implying, *inter alia,* that he had breached his fiduciary duties to Mobil, wasted and misused Mobil assets, and diverted such assets to Peter Tavoulareas for his benefit. Petitioner also alleged that the article defamed him by falsely stating, *inter alia,* that he had "personally urged" that his son be included as an equity partner in Atlas (A115-A127, ¶ 23), that he had personally "dispatched"

a Mobil shipping executive to help run Atlas (¶ 82), and that he had caused Mobil to "provide" ships, office space, and personnel to Atlas (¶¶ 4, 21, 57, 82).

Contrary to the article's implications that, as Tyler put it, petitioner "orchestrate[d]" the Mobil-Samarco-Atlas transactions for his son's benefit, the record in this case established that the entire transaction made excellent business sense, substantially benefited Mobil's shareholders, and had been cleared by Mobil's Conflict of Interest Committee. *See, e.g.*, A300-A303 (MacKinnon, J., dissenting).

B. Proceedings In the District Court

The district court, over petitioner's objection, held that he was a limited purpose public figure and thus was required to prove "actual malice". At trial petitioner testified in detail about what he did and did not do regarding the Mobil-Samarco-Atlas transactions. So too did Peter Tavoulareas, Peter's partner, Ares Emmanuel, and senior Mobil officers. Each witness was extensively cross-examined about these transactions. Thus, the jury had virtually a day-by-day account of Mobil's decision to invest in Samarco and commit ships to it, the formation of Atlas and its relationship with Samarco, the changes in Atlas' management, and petitioner's relationship or lack thereof to these matters. However, *the jury never saw or heard from the Post's prime source,* George Comnas, the founder and original managing director of Atlas, although he was available to testify.

After 20 days of trial and testimony by 40 witnesses, the jury was properly instructed on the full range of common law and constitutional libel issues in a public figure case. On the issue of defamatory meaning, the district court instructed the jury to determine whether, as petitioner's complaint contended, the articles had reasonably implied:

> That [William Tavoulareas] breached his fiduciary duties to Mobil. That he wasted and misused assets of Mobil. That he wrongfully diverted such assets to Peter Tavoulareas for his benefit . . .

A315. The jury thereafter rendered a general verdict in petitioner's favor against respondents Patrick Tyler and the *Post* for $250,000 in compensatory damages, and against the *Post* for $1.8 million in punitive damages.[2] The jury also rendered a general verdict in petitioner's favor against respondent Piro for $5,000 in compensatory damages. The jury necessarily found that the article was false, that it defamed petitioner, and that it was published with actual malice.

In May 1983, the district court granted respondents' j.n.o.v. motions. Despite finding the article "slanted" and "far short of . . . a model of fair, unbiased, investigative journalism" (A5), the court found that petitioner had failed to establish actual malice. The court did not disturb the jury's finding that the article was false.

C. The Three-Judge Panel's Decision

In April 1985 a divided panel of the court of appeals reinstated the jury's verdicts. In an opinion by Judge MacKinnon, with then-Judge Scalia concurring, the panel majority found that the article could be understood by the

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[2] The jury found in favor of two other *Post* defendants and found that none of the *Post* defendants was liable to Peter Tavoulareas. The jury also returned a verdict in petitioner's favor against Sandy Golden, a "special correspondent" on the November 30th story. The panel affirmed the district court's j.n.o.v. to Golden (A111-A113), and he is not a party to this petition. The jury also awarded Peter Tavoulareas $1,000 in compensatory damages against Piro. The district court upheld that verdict and it is not at issue in this petition.

average reader to allege that petitioner "was guilty of corporate nepotism, breached his fiduciary duty to Mobil, and misused Mobil assets." A57. The panel also held that petitioner had introduced sufficient evidence of actual malice. A107-A108. The panel interpreted *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), as permitting an appellate court to review only the ultimate conclusion of clear and convincing evidence of actual malice, not each subsidiary fact determination comprising that conclusion. A48-A49. In conducting this constitutionally mandated actual malice review, the panel held that it must view the evidence and reasonable inferences therefrom in the light most favorable to the jury's verdict. A52.

D. The *En Banc* Proceedings

On June 11, 1985, the full court of appeals vacated the panel opinion and set the case for rehearing *en banc*. A391. The court directed additional briefing on petitioner's status as a public figure, as well as on the applicability of this Court's *Bose* decision to the review of a jury verdict. A196-A197.

On March 13, 1987, seventeen months after oral argument, and almost four years after the appellate process had commenced, the *en banc* court affirmed the entry of the judgments n.o.v. A200. First, the court found that Tavoulareas was a limited purpose public figure. A219. Next, the court held that the *Post* article was not reasonably capable of being read to imply that Tavoulareas had manipulated Mobil to join Samarco and help Atlas in a scheme to help his son. A229. The court held that this lengthy front-page investigative article could imply, at most, that petitioner had engaged in a dictionary definition of "nepotism"—*i.e.*, that he had provided his son with an

opportunity because of kinship, not merit. A228.[3] Purporting to apply "traditional" j.n.o.v. rules, the court then found that this allegation of nepotism was substantially true. A237-A243.

Although the court also found certain portions of the article false, it held either that (a) those statements did not bear any additional defamatory "sting" beyond the sting of "true" statements and thus were not actionable; or (b) petitioner had failed to prove actual malice as to those portions.

Chief Judge Wald concurred in the judgment, but not the majority opinion. Judge Wald criticized the majority opinion for failing to acknowledge that it had, in fact, applied a heightened standard of appellate review. A283-A287. To Judge Wald, it was only by rejecting permissible inferences the jury had found in petitioner's favor, a methodology she considered required by this Court's decision in *Bose Corp., supra,* that the jury's verdicts could be overturned. A287.[4] Judge MacKinnon dissented, adhering to the panel's decision that the article was false, defamatory and published with actual malice. Like Judge Wald, he insisted that the court had not applied "traditional" j.n.o.v. standards in assessing the jury's verdicts.

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[3] Without citation or discussion, the court held, in a footnote, that even if the article could reasonably be read to imply that petitioner had misused Mobil assets to enrich his son, this allegation "is of no consequence" since "the *Post* has the absolute right to express its opinion on the propriety of Tavoulareas' involvement in Atlas' affairs." A226-A227, n.16.

[4] Judge Ginsburg specially concurred, suggesting procedures by which trial courts could reduce the perceived problem that " 'juries do not give adequate attention to limits imposed by the first amendment and are much more likely than judges to find for the plaintiff.' " A290 (*quoting Ollman* v. *Evans,* 750 F.2d 970, 1006 (D.C. Cir. 1984) (*en banc*), *cert. denied,* 471 U.S. 1127 (1985) (concurring opinion)).

Reasons for Granting the Writ

Nothing illustrates the sorry state of American libel law better than the post-verdict record of this case. That law is in intolerable disarray. Appellate judges are emboldened to disregard established principles of law and methods of review in the apparent belief that first amendment values inexorably outweigh reputational interests. The *en banc* opinion below reflects this general phenomenon. The *en banc* court refused to consider the article as a whole. Instead, the court fragmented, isolated, and compartmentalized each of the statements in the article, as well as the evidence of falsity and actual malice. The court thus reduced petitioner's case to much less than the sum of its parts. The *en banc* opinion provides a textbook model for appellate courts to nullify jury verdicts in defamation cases.

If defamation actions are inconsistent with the first amendment, this Court should say so, openly and forthrightly. Of course, this is not—and never has been—the law of the land. No court has ever doubted that society has a "pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt* v. *Baer*, 383 U.S. 75, 86 (1966). Just recently, in *Philadelphia Newspapers, Inc.* v. *Hepps*, 106 S. Ct. 1558, 1562 (1986), this Court emphasized:

> "The need to avoid self-censorship by the news media is . . . not the only societal value at issue . . . [or] this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation." *Gertz, supra,* 418 U.S. at 341. . . See also *Rosenblatt* v. *Baer*, 383 U.S. 75, 92 . . .(1966) (Stewart, J., concurring). Any

> analysis must also take into account the "legitimate state interest underlying the law of libel [in] the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz, supra,* 418 U.S., at 341. . .

The four dissenters in *Hepps* completely agreed with this statement. *See* 106 S. Ct. at 1566-67.[5]

Based primarily on all ill-defined fear that "jurors have considerable trouble 'distinguishing actual malice from negligence' "[6]—the very kind of state of mind determinations that juries routinely make in criminal cases—lower courts in defamation cases have consistently reversed jury verdicts for plaintiffs.[7] This Court's holding in *Bose Corp., supra,* that appellate judges must independently decide whether the record evidence clearly and convincingly establishes actual malice, was not intended to license a wholesale judicial nullification of the jury's constitutional role. *Anderson* v. *Liberty Lobby, Inc.,* 106 S. Ct. 2505, 2513 (1986) makes that clear.

Moreover, in this case, the court of appeals went far beyond even the broadest reading of the duties of independent review imposed by *Bose* and its predecessors. Impelled by the misconception that first amendment interests alone weigh on the scale, the court rejected the jury's verdicts not merely on the issue of actual malice

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[5] *See also* Post, *The Social Foundations of Defamation Law: Reputation and the Constitution,* 74 Calif. L. Rev. 691, 693 *et. seq.* (1986).

[6] A290 (Ginsburg, J., concurring).

[7] Nearly 70% of jury verdicts in favor of libel plaintiffs have been reversed on appeal since 1980. "When 'independent review' was specifically applied, the reversal rate was even higher, approaching eighty percent." Kaufman, *Libel 1980-1985: Promises and Realities,* 90 Dick. L. Rev. 545, 556-57 (1986).

but also on the fundamental issues of defamatory meaning and falsity. There is, of course, *no* evidence whatever for the belief that a jury is inherently incapable of determining what an article meant and whether it was false. The media's own studies make clear that juries are not biased against them.[8]

The *en banc* court's lengthy and heavily footnoted opinion is crafted to appear as only a fact-dependent application of wholly uncontroversial legal standards, and thus an inappropriate candidate for review by this Court. But neither its rhetoric nor its form can hide the opinion's substance. In rejecting the jury's determination of falsity, the *en banc* court reflects a level of jury distrust that far exceeds all that has gone before. Much is said of the "chilling effect" of defamation suits on the media. To date, nothing has been said of the impact on defamation plaintiffs of a systematic pattern of judicial nullification of jury verdicts.

In three important ways the court's decision radically alters the accommodation between free speech and protection of reputation this Court has fashioned. First, as we shall show, the opinion rests entirely on an unarticulated and incorrect doctrine requiring application of the most restrictive meaning possible to defamatory statements. The court's implicit "most restrictive meaning" rule constitutes a substantial new barrier to the maintenance of libel suits.

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[8] "The recent trial results and LDRC's studies also appear to indicate that juries are not inherently biased against the media in libel cases." Kaufman, *Libel 1980-1985: Promises and Realities*, 90 Dick. L. Rev. 545, 553 (1986). (LDRC is the Libel Defense Resource Center, formed by a coalition of media organizations. The author is its general counsel.) Thus, the apparently fashionable suspicion that juries "do not give adequate attention to limits imposed by the first amendment" (A290, (Ginsburg, J., concurring, *quoting Ollman, supra*)) is entirely without justification.

Second, by rejecting obvious credibility findings and reasonable inferences the jury drew in favor of the verdicts, the court has effectively rendered juries in defamation actions vestigial appendages, and, in substance, held that no amount of circumstantial evidence can suffice to establish actual malice. In rejecting the jury's verdict on such quintessential jury questions, the court violated this Court's teachings in *Anderson* v. *Liberty Lobby, Inc., supra,* 106 S. Ct. at 2513, that, even on the issue of actual malice, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."

Third, by redefining the public figure concept to include virtually every business executive who has ever spoken publicly on an issue of concern to his industry, the court has greatly expanded the number of libel plaintiffs who must meet the constitutional burdens of *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). By doing so, while simultaneously reducing plaintiffs' ability to meet that burden, the court has virtually destroyed defamation as a viable cause of action for the great majority of American business executives.

The court of appeals' methodology in this case constitutes a *de facto* impermissible "double counting" in favor of defamation defendants. *Calder* v. *Jones,* 465 U.S. 783, 790-91 (1984). The scales are so heavily weighted for defendants that defamation actions exist only in law school casebooks. *See* Note, *The Future of Libel Law and Independent Appellate Review: Making Sense of Bose Corp.* v. *Consumers Union of United States, Inc.,* 71 Cornell L. Rev. 477, 495 (1986) ("independent appellate review has bestowed 'near-immunity from defamation judgments' upon

publishers"); Abrams, *The Supreme Court Turns A New Page in Libel*, 70 A.B.A.J. 89 (1984) (*Bose* has created "an awesome barrier to recovery in most actions commenced by public officials or other public figures"). Petitioner submits that if the court of appeals is correct, and the *real* law in force is that "publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation," *Hepps, supra*, 106 S. Ct. at 1562, this Court should openly announce that fact Otherwise, this Court should grant certiorari to reject the judicial nullification evidenced below.

I.

The Court Violated Petitioner's Constitutional and Common Law Rights by Applying an Unprecedented Principle of Most Restrictive Meaning of the Article.

A " 'publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it.' " *Washington Post Co.* v. *Chaloner*, 250 U.S. 290, 293 (1919) (citation omitted). The court must determine whether a communication is capable of bearing a particular defamatory meaning, but in so doing the court may not artificially restrict the jury's ability to choose the meaning that the average reader would take from the article.[9] It is thus for the *jury* to decide whether a communication, found capable of a

[9] " 'It is only when the court can say that the publication is not reasonably capable of any defamatory meaning, and cannot reasonably be understood in any defamatory sense, that the court can rule, as a matter of law, that the publication is not libellous.' " *Gariepy* v. *Pearson*, 207 F.2d 15, 16 (D.C. Cir.), *cert. denied*, 346 U.S. 909 (1953) (citation omitted); *McBride* v. *Merrell Dow and Pharmaceuticals Inc.*, 717 F.2d 1460, 1465 (D.C. Cir. 1983).

defamatory meaning by the court, was in fact so understood by its recipient. *Restatement (Second) of Torts* § 614(2) (1977).

While it voiced its formal obedience to these well-established rules, the court of appeals in fact invoked a radical rule of "most restrictive meaning" to narrow artificially the defamatory range of the article. This "most restrictive meaning" construct was outcome determinative: only by such a device was the court able to hold the article "substantially true." [10] There was abundant uncontradicted evidence that Tavoulareas did not misuse Mobil assets or breach his fiduciary duties to Mobil by his or his son's activities relative to Samarco and Atlas. All this evidence was put aside because the court refused to acknowledge that the article charged misuse of corporate position. Quite plainly, without its denuded reading of the article, the court, like the jury and the panel, would necessarily have concluded that the article was false, defamatory and published with actual malice. A260. *See* discussion, *infra* at 20, n.16.

We assume that as a matter of local law a state might adopt a principle of most restrictive meaning of defamatory statements, and that such a rule would provide no basis for review by this Court. But the court below did not purport to ground its invocation of its most restrictive meaning rule in existing District of Columbia law. Instead, the court's most restrictive meaning construct was the product of its misperception of this Court's balancing of first amendment and reputational interests. Faced with its own unavoidable conclusion that the Peterson memorandum "demonstrat[ed] malice" with regard to the broader defamatory meaning of the article (A260), and its perception that juries do not

[10] In fact, even fairly applying such a rule, the court's ultimate conclusion is beyond the pale of reason. The minimal rational interpretation of this article is that it charges petitioner with misuse of assets and breach of fiduciary duties.

provide adequate protection of first amendment interests (A290 (Ginsburg, J., concurring)), the court fashioned its implicit rule of construction.[11] Because the court incorrectly perceived that the first amendment required such a rule of construction, this Court should grant certiorari. *See, e.g., Three Affiliated Tribes* v. *Wold Engineering, P.C.*, 467 U.S. 138, 152-55 (1984); *Delaware* v. *Prouse*, 440 U.S. 648, 651-53 (1979).

Even had the court of appeals grounded its "most restrictive meaning" rule in District of Columbia law, review by this Court would be proper. This Court has long recognized that when an issue concerning District law has national repercussions and "has an impact not confined to the Potomac's shores" it may grant certiorari. *General Motors Corp.* v. *District of Columbia*, 380 U.S. 553, 556-57 (1965). *See Del Vecchio* v. *Bowers*, 296 U.S. 280, 285 (1935). Because of the importance of the newsgathering process in our nation's capital, and the extraordinary effect the lower court's decision will have on that process, certiorari would be warranted even had the court grounded its novel rule of construction on "local" District of Columbia law. *See Pernell* v. *Southall Realty*, 416 U.S. 363, 368-69 (1974).[12]

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[11] The court below was not the first court, we submit, to have so erred. In *Chuy* v. *Philadelphia Eagles Football Club*, 595 F.2d 1265, 1282, n.23 (3d Cir. 1979) the court explicitly found that first amendment "overtones" affected a determination of defamatory meaning: "A decision about defamatory meaning is indeed made here under state law. But because the law of defamation demands the accommodation of an interest in personal reputation and an interest in vigorous and full public discussion, this area of the law has first amendment overtones." *See also Ollman* v. *Evans, supra*, 750 F.2d at 991 ("Ours is a practical task, with elemental constitutional values of freedom looming large as we go about our work.").

[12] Moreover, the court's invocation of its radical rule of interpretation was retroactive law-making. The court's action was the

(footnote continued on following page)

That the court did not explicitly avow its most restrictive meaning rule of interpretation is irrelevant; its presence is evident throughout its opinion. Perhaps the clearest illustration is the court's astonishing assertion that a charge of "misuse of corporate assets" is equivalent to a charge of "nepotism" and thus "change[s] nothing" and "is of no consequence." [13] A226, n.16. To render such disparate charges synonymous is incomprehensible. Charges that

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equivalent of retroactively and selectively abolishing an accrued cause of action for defamation in violation of the due process clause of the fifth amendment. The due process clause imposes restrictions on the judicial power to reshape law in the application process, particularly if the restructuring occurs at the appellate level. *Shuttlesworth* v. *Birmingham,* 394 U.S. 147, 155-59 (1969); *Ashton* v. *Kentucky,* 384 U.S. 195, 198 (1966). This perception also lies at the core of this Court's rejection of a claim that a state court judgment rests on an adequate and independent state ground when in fact the state appellate court has invoked a "novel" procedural rule to bar the federal claim. *NAACP* v. *Alabama, ex rel. Patterson,* 357 U.S. 449, 457-58 (1958). *See* Hill, *The Inadequate State Ground,* 65 Colum. L. Rev. 943, 966-69 (1965). Certiorari is additionally warranted to correct this constitutional error.

[13] In a footnote, the court stated that petitioner did not urge the misuse of assets and breach of fiduciary duty constructions. This statement is mystifying. The case was tried throughout on this theory (*see e.g.* Tr. 99, 4349-60, 4372-75) and at petitioner's request the jury was expressly charged on the theory that it could find that the sting of the article was corporate abuse. *See* discussion, *supra* at 8. Indeed, the district court in its j.n.o.v. decision considered both the "orchestration" and the "misuse of assets" implications separately. A18-A20. Moreover, even though few pages of petitioner's—or any other—briefs to the court of appeals focused on defamatory meaning, petitioner's claims were invariably tied to misuse of assets and breach of fiduciary duty. Respondents erroneously argued below that the misuse allegation was made only with respect to the December 1 article. Petitioner focused on the December 1 article as a clear example of a charge of misuse, but never conceded that the November 30th article failed to contain such an implication. Moreover, the jury was charged on corporate misuse and breach of fiduciary duty with respect to both articles. *See* discussion, *supra* at 8.

petitioner favored his son are one thing; charges that he breached his fiduciary duties to the company and misused his employer's assets are quite another. The article's opening four paragraphs dramatically confirm the implication that petitioner abused his position with Mobil. The very first words identified petitioner as Mobil's president; then Mobil was mentioned eight times: *e.g.*, "Today with the help of Mobil . . .", "Mobil initially provided Atlas . . ." No other Mobil official was identified as the executive behind those business actions.

The court of appeals' most restrictive interpretation effectively read Mobil, and petitioner's position as its president and chief operating officer, out of the article. Yet the article mentioned Mobil over one hundred times and identified petitioner acting as president of Mobil ten times.[14]

Another illustration of the court's most restrictive meaning construct was its rejection of the article's implication that petitioner had manipulated Mobil to join Samarco and create Atlas for the benefit of his son Peter; that he had, in Tyler's words, "orchestrated" the whole Mobil-Samarco-Atlas relationship for the sake of his son. A230-A236. The article could reasonably be read to imply that Mobil's participation in Samarco was motivated by Tavoulareas' intention that George Comnas, who would negotiate Mobil's entry into Samarco, would later run Samarco's management

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[14] The court stated in a footnote, without citation or analysis, that the article's implication that petitioner had misused Mobil assets could not support liability since the *Post* had the "absolute right to express its opinion on the propriety of Tavoulareas' involvement in Atlas' affairs." A226-A227, n.16. That crucial *ipse dixit* determination was contrary to the four-part fact/opinion test set out by the same *en banc* court in *Ollman* v. *Evans, supra,* 750 F.2d at 979. Under any reasoned analysis the "misuse of assets" allegation, published on the front page of the *Post,* was actionable fact, not constitutionally protected opinion.

arm and offer Peter a partnership in the company. *See* A122, ¶¶ 50-52; A321-A322 (MacKinnon, J., dissenting). The court erred in rejecting the confirmation of that meaning in the memoranda reporter Tyler and editor Peterson passed to their superiors on the eve of publication. *See Greenbelt Cooperative Publishing Association, Inc.* v. *Bresler*, 398 U.S. 6, 14 (1970). The court ignored the rule that "[t]he meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express." *Restatement (Second) of Torts* § 563 (1977).[15] Without question, Peterson's interpretation of the article, and the author's response, are strong evidence of what the article actually meant; they are virtually dispositive of the question whether the article was capable of that meaning.[16]

The court's "most restrictive meaning" doctrine is the direct product of its misapprehension of the import of this Court's libel rulings. Left standing, the court's opinion virtually destroys the viability of libel suits in which the primary defamation is by implication, rather than direct statement. This Court should grant certiorari to correct the court of appeals' erection of a substantial new barrier to the maintenance of libel suits.

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[15] The court of appeals' methodology which did not "permit inquiry into the actual interpretations and responses of a reputational community endangers the very concept of reputation and the validity of a body of law designed to protect it." Bezanson & Ingle, *Plato's Cave Revisited: The Epistemology of Perception in Contemporary Defamation Law*, 90 Dick. L. Rev. 585, 607 (1986).

[16] The Court's strained "analysis" on this "orchestration" point may be best explainable by reference to its discussion of actual malice. Because the court held that the Peterson memorandum "demonstrate[d] malice" as to this implication (A260), the court would have been required to find for petitioner if it found the article capable of that meaning.

II.

The Court Violated Petitioner's Seventh Amendment Rights by Failing to View the Evidence and the Reasonable Inferences Therefrom in the Light Most Favorable to Him, Thereby Finding No Actual Malice.

This Court's decision in *Bose Corp., supra,* has been the source of considerable uncertainty.[17] The lower courts, state and federal, need guidance regarding the proper scope of appellate review of jury findings of actual malice.

In seeking to avoid this precise issue (on which it had requested supplemental briefing), the court purported to apply "traditional" j.n.o.v. standards, claiming to view the evidence, and the inferences therefrom, in the light most favorable to petitioner. But, as recognized by Chief Judge Wald in her concurrence in the judgment, the majority in fact applied a heightened but unarticulated standard of

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[17] "The proper scope of review expected of appellate courts under *Bose* is currently the subject of hot debate." *Starkins* v. *Bateman,* 150 Ariz. 537, 724 P.2d 1206, 1212 (Ct. App. 1986). *Compare* Chief Judge Wald's dissent (*Bose* "requires us to independently review inferences that the jury may be presumed to have drawn, even though those inferences are 'permissible' ones under the traditional judgment n.o.v. standard") (A284-A285) and *McCoy* v. *Hearst Corp.,* 42 Cal. 3d 835, 727 P.2d 711, 718, 231 Cal. Rptr. 518 (1986) (In Bank), *cert. denied,* 55 U.S.L.W. 3746 (1987) (under *Bose,* reviewing court not bound to consider evidence of actual malice in light most favorable to respondent; court may substitute its own inferences for those drawn by trier of fact) *with Bartimo* v. *Horsemen's Benevolent and Protective Ass'n,* 771 F.2d 894, 898 (5th Cir. 1985), *cert. denied,* 106 S. Ct. 1635 (1986) (*Bose* review limited to ultimate finding not to credibility determinations and subsidiary factual findings) and *Lerman* v. *Flynt Distrib. Co.,* 745 F.2d 123, 140 (2d Cir. 1984), *cert. denied,* 471 U.S. 1054 (1985) (*Bose* does not permit appellate court to substitute its view for legitimate jury findings). *See* Bezanson, *Fault, Falsity and Reputation in Public Defamation Law: An Essay on Bose Corporation* v. *Consumers Union,* 8 Hamline L. Rev. 105 (1985).

review.[18] As Chief Judge Wald stated: "For future cases we badly need to clarify the appropriate role of a reviewing court in this volatile area of the law, and in this case, regrettably, we have lost a valuable opportunity to do so." A287.

The first amendment does not transform appellate judges into jurors. Monaghan, *Constitutional Fact Review,* 85 Colum. L. Rev. 225, 229, n.8 (1985). The seventh amendment requires that the evidence, and the reasonable inferences therefrom, be reviewed in the light most favorable to petitioner. On issues of credibility and inferences, it would be plainly irrational to prefer the views of appellate judges who were not present at trial to those of the jurors who were. This Court's decision in *Anderson* v. *Liberty Lobby, Inc., supra,* recognized that fact when it stated that, in reviewing actual malice evidence, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." 106 S. Ct. at 2513. This rule of review makes even more sense when a motion for j.n.o.v. is before the court. It simply makes no sense to require that a trial court give a defamation case to a jury because the jury *could* find for plaintiff by making credibility determinations and drawing permissible inferences in his favor, while simultaneously holding that an appellate court may *reverse* that jury's verdict by rejecting

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[18] "[T]he majority does in fact subject the evidence of actual malice to independent review of inferences to be drawn from it . . . What I find disturbing, though, is its reluctance to acknowledge what it is doing or to grapple with the articulation of what is a proper application of *Bose* to the record." A287 (Wald, C.J., concurring).

those same credibility determinations and inferences after the jury has actually made them.[19]

The court below violated the requirements of *Bose* and *Anderson*. The court acknowledged that the article falsely alleged that petitioner had "personally urged" that his son be made a partner in Atlas. But by rejecting credibility determinations and reasonable inferences that the jury drew in petitioner's favor, the court concluded that this statement had not been made with actual malice.[20] Two examples will suffice. First, the court acknowledged that the jury could have found that editor Peterson conveyed to the respondents that she found "the story's theme impossible to believe," and it recognized that the Peterson memorandum was "evidence of . . . actual malice." A260. Nevertheless, it concluded that this evidence could not support an inference of actual malice with respect to the "personally urged" allegation. A260, n.44. For the court, editorial disbelief of the article's theme could not be evi-

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[19] *See Zerangue* v. *TSP Newspapers, Inc.*, 814 F.2d 1066, 1072 (5th Cir. 1987) ("[T]he drawing of inferences and the determination of credibility will still be a task for the factfinder."); *Tosti* v. *Ayik*, 394 Mass. 482, 476 N.E.2d 928, 935 (1985) (in reviewing actual malice determination appellate court must view facts most favorably to prevailing party); *Starkins* v. *Bateman*, 150 Ariz. 537, 724 P.2d 1206, 1212 (Ct. App. 1986) (*Bose* review only permits *de novo* review of ultimate findings, not of the underlying facts or credibility determinations; to allow *de novo* review of underlying facts "would entirely displace the function of the jury in defamation cases"). *See also Alston* v. *Bowins*, 733 F.2d 161, 164 (D.C. Cir. 1984); *Connell* v. *Sears, Roebuck & Co.*, 722 F.2d 1542, 1546 (Fed. Cir. 1983); *Manaia* v. *Potomac Electric Power Co.*, 268 F.2d 793, 799 (4th Cir.), *cert. denied*, 361 U.S. 913 (1959).

[20] Chief Judge Wald recognized that it was only by rejecting permissible inferences the jury drew in petitioner's favor that these verdicts could be overturned: "I do not think an ordinary judgment n.o.v. standard, or even the pre-*Bose* independent review standard the majority claims to apply, would permit us to overturn the verdict. . . ." A283 (footnote omitted).

dence of actual malice regarding any specific statement therein.

Second, the court conceded that there was evidence casting doubt on the reliability of Comnas, the *Post's* principal source, including "evidence of personal animus between Comnas and Tavoulareas," but it rejected the inference that reliance on Comnas could be viewed as probative of actual malice. *See* A251-A256. Moreover, the court held that the jury was precluded from drawing any unfavorable inference from the fact that the *Post* failed to call Comnas as a witness or use any of his deposition testimony.[21]

Throughout its opinion the court of appeals simply assumed the role of the jury and credited respondent Tyler's version of events. But because his notes and credibility were repeatedly impeached, the jury had abundant reasons to disbelieve Tyler. Tyler's obvious ill will towards Tavoulareas—as evidenced by his willingness to solicit the commission of a crime to obtain evidence against Tavoulareas and his telling of a completely false story about Tavoulareas to the U.S. Customs Service—clearly permitted the jury to disbelieve Tyler's testimony. A347; RE 794-95, 870-71, 2375; 1139-42, 1280-81, 1285-90, 2347, 2677.[22]

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[21] Comnas' statements were the core of the *Post*'s defense. That defense was tremendously weakened by its unexplained reliance on Tyler, whose credibility was seriously challenged, to provide *hearsay* testimony on what Comnas had told him.

[22] The court also rejected uncontroverted evidence that Tyler desired to harm petitioner because of a prior conflict with Mobil, and that Tyler had repeatedly expressed hostility toward Mobil. Similarly, the court found irrelevant to actual malice the admitted pressure that was placed on *Post* reporters to generate sensationalistic stories, evidence that Tyler either negligently or deliberately misstated remarks by interviewees, and evidence that the article regularly drew inferences adverse to petitioner where favorable inferences were equally justified. *See generally,* A337-357 (MacKinnon, J., dissenting).

The court's methodology effectively renders meaningless jury verdicts in defamation cases and grants *de facto* immunity to media defendants in actual malice cases. This Court should grant certiorari to take advantage of this "valuable opportunity", as Chief Judge Wald put it, and resolve the significant constitutional conflict over the proper scope of appellate review of jury verdicts.

III.

The Court Erred in Holding Tavoulareas to Be a Public Figure.

A. Petitioner Is Not a Limited Purpose Public Figure

The public figure doctrine has proved extremely difficult for the lower courts to administer. In the well-known words of one judge quoted by the court below, "Defining public figures is much like trying to nail a jellyfish to the wall." A212. The public figure doctrine has spawned diverse tests that produce an erratic administration of justice, unfairness to litigants, and disservice to first amendment interests.[23] This petition presents an appropriate occasion for this Court to provide needed guidance on the specific application of the doctrine.[24]

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[23] The absence of any comprehensive test of public figure has led the lower courts to design a plethora of tests to determine public figure status. *See, e.g., McDowell* v. *Paiewonsky*, 769 F.2d 942, 948 (3d Cir. 1985) (2-part test); *Lerman* v. *Flynt Distrib. Co.*, 745 F.2d 123, 136-137 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985) (4-part test); *Fitzgerald* v. *Penthouse Int'l, Ltd.*, 691 F.2d 666, 668 (4th Cir. 1982), *cert. denied*, 460 U.S. 1024 (1983) (5-part test); *Waldbaum* v. *Fairchild Publications, Inc.*, 627 F.2d 1287, 1296-98 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980) (3-part test).

[24] *See Rosanova* v. *Playboy Enter., Inc.*, 580 F.2d 859, 861 (5th Cir. 1978) ("Although the public figure concept has eluded a truly

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The court below found petitioner to be a "limited purpose public figure" for purposes of two "public controversies": 1) "whether the management and structure of the United States' private oil industry was in need of alteration or reform" (A213-A214); and 2) a controversy "concerning the Mobil-Samarco-Atlas arrangement." A216. By that articulation of the "controversy", the court vastly extended this Court's public figure decisions and, in substance, created a special "Fortune 500" rule. Now any corporate executive of such a company who speaks on *any* public issue will, *ipso facto,* find that he has opened himself to a wide range of character attacks. This special rule offends fundamental notions of personal equality, *Pennzoil Co.* v. *Texaco, Inc.*, 107 S. Ct. 1519, 1538 (1987) (Stevens & Marshall, JJ., concurring). It also unconstitutionally burdens petitioner's right of free speech.

As the term itself implies, a person is a "limited purpose public figure" only with respect to statements germane to those controversies in which he voluntarily becomes involved.[25] A person's participation in any public controversy

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working definition, it falls within that class of legal abstractions where 'I know it when I see it,' in Mr. Justice Stewart's words.") (footnote and citations omitted); *Marcone* v. *Penthouse Int'l Magazine For Men,* 754 F.2d 1072, 1982 (3d Cir.), *cert. denied,* 106 S. Ct. 182 (1985) ("Without a precise diagram for guidance, courts and commentators have had considerable difficulty in determining the proper scope of the public figure doctrine."); *Harris* v. *Tomczak,* 94 F.R.D. 687, 697 (E.D. Cal. 1982) ("[A] fundamental problem in the resolution of libel cases is the failure of the Supreme Court to provide an adequate definition of the term 'pubic figure.' ").

[25] *See Waldbaum* v. *Fairchild Publications Inc.*, 627 F.2d 1287, 1298 (D.C. Cir.), *cert. denied,* 449 U.S. 898 (1980) ("the alleged defamation must have been germane to the plaintiff's participation in the controversy"); *Lerman* v *Flynt Distrib., supra,* 745 F.2d at 136-37 (to be a public figure, *inter alia,* plaintiff must have "voluntarily injected himself into a public controversy related to the subject of the litigation").

has not heretofore exposed his whole life to the risk of defamatory falsehood. *See Ryder* v. *Time, Inc.*, 557 F.2d 824, 826 (D.C. Cir. 1976). Yet that is precisely the effect of the decision below, at least for corporate officials like petitioner. The court said that the November 30 article was "germane" to the admittedly "broadly defined controversy" (A216) over whether the management and structure of American oil companies should be reformed. The court held the defamatory article "not 'wholly unrelated' to" that controversy because "the credibility and integrity of representatives of the oil industry had become an issue." *Id.* This conclusion is wrong for two reasons.

First, the article is not about reformation of the structure of the oil industry. Indeed, the court's conclusion is in direct conflict with its earlier holding that the article charged only nepotism, not misuse of assets or breach of fiduciary duty. Second, for corporate officials like petitioner, the court's "not wholly unrelated" test erroneously turns all "limited purpose public figures" into public figures for all purposes. Every defamatory statement may be considered as reflecting on an individual's "credibility and integrity."

As to the second "controversy" (over the "Mobil-Samarco-Atlas arrangement") there was no pre-existing "public" controversy about Mobil-Samarco-Atlas. This Court has made clear that "mere newsworthiness" does not suffice; there must be a real public debate or controversy. *Wolston* v. *Reader's Digest Association, Inc.*, 443 U.S. 157, 166, n.8, 167-68 (1979); *Hutchinson* v. *Proxmire*, 443 U.S. 111, 135 (1979); *Time, Inc.* v. *Firestone*, 424 U.S. 448, 454 (1976). At bottom, the court fashioned yet another "Fortune 500" rule: the purely internal controversies of large corporations are public controversies simply because

the press becomes interested. Under this new rule, the press itself can create the public controversy. This is, of course, not the law.

The court's public figure holding renders all significant business executives limited public figures. This Court should grant certiorari to reverse such an arbitrary and ill-considered doctrine.

B. The Public Figure Doctrine Should Be Overruled

It is not surprising that the court fell into error on its public figure holding. Current public figure doctrine has no coherent grounding in fundamental first amendment principles, as numerous commentators have observed.[26] The doctrine should be overruled. *See Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 763, 765 (1985) (concurrences of Burger, C.J. and White, J., respectively); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 387 (1974) (White, J., dissenting); *Douglass* v. *Hustler Magazine, Inc.*, 769 F.2d 1128, 1141 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1489 (1986). *New York Times* v. *Sullivan* appropriately restricts defamation actions to protect the historical right of citizens to criticize the policing and performance of public officials. Simply put, that rationale cannot justify assigning to some private citizens the status of public officials for purposes of defamation law.

Present "public figure" doctrine is merely the lingering wraith of the plurality standard of *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 43 (1971), which would have loosened *Sullivan* from its citizen-critic moorings and have

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[26] *See, e.g.*, Schauer, *Public Figures*, 25 Wm. & Mary L. Rev. 905, 925-29 (1984); Branson & Sprague, *The Public Figure-Private Person Dichotomy: A Flight from First Amendment Reality*, 90 Dick. L. Rev. 627 (1986).

extended it to any "matter . . . of public or general interest." In *Gertz*, this Court rejected *Rosenbloom*, and it should now reject *Rosenbloom*'s remaining vestige, the public figure doctrine.

We emphasize that the constitution embodies a fundamental distinction between governmental officials and private persons.[27] *Civil Rights Cases*, 109 U.S. 3, 11 (1883). No reason exists why the first amendment requires that this distinction be abandoned in defamation law. For constitutional purposes, speech by private persons remains just that; simply because of their prominence or a high degree of media interest, private persons are not in effect transformed into quasi-public officials. In overlooking the basic constitutional distinction between public officials and private persons, current public figure doctrine is inconsistent with core constitutional presuppositions. The public figure doctrine should be overruled.

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[27] The conduct of private persons is held to constitutional standards only when the private party acts in conjunction with a public official, performs a nondelegable public function, or otherwise possesses a close and substantial nexus to government officials. *See Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). No such showing can be made here. *Blum* v. *Yaretsky*, 457 U.S. 991, 1004-12 (1982); *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 840-43 (1982).

Conclusion

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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